Supreme Court, U.S.
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No. 03

In The

Supreme Court of the United States

DANIEL STERLING,

Petitioner,

v.

ERNEST C. ROE, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. DID AN INSTRUCTION BY THE STATE TRIAL COURT PERMITTING THE JURY TO BASE ITS CONVICTION OF THE CHARGED CRIMES WHOLLY ON THE PETITIONER'S COMMISSION OF A PAST UNCHARGED OFFENSE VIOLATE HIS CONSTITUTIONAL RIGHT TO DUE PROCESS?

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OPINIONS BELOW

The unpublished opinion of the Ninth Circuit Court of Appeals affirming the judgment of the district court was issued on February 26, 2003, *Sterling v. Roe*, D.C. No. CV-01-03809-WHA No. 02-16129, and appears at Appendix 1-4.

The opinion of the District Court for the Northern District of California denying the petition for a writ of habeas corpus was issued on April 22, 2002, and appears at Appendix 5-45.

The opinion of the California Court of Appeal affirming petitioner's state court convictions for attempted murder and related offenses was issued on November 15, 1999 and appears at Appendix 46-63.

STATEMENT OF JURISDICTION

The District Court for the Northern District of California exercised jurisdiction of the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On April 23, 2002, petitioner filed a timely notice of appeal from that court's order and judgment denying the petition. On May 29, 2002, the District Court issued its certificate of appealability, pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b).

The Ninth Circuit Court of Appeal entered its judgment on February 26, 2003. The Ninth Circuit denied petitions for panel rehearing and for rehearing en banc in an order dated April 16, 2003 (Appendix 64). That judgment was final and therefore subject to appeal to this

Court pursuant to 28 U.S.C. § 2253. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

(Emphasis supplied)

The Fourteenth Amendment to the United States Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of*

> *law*; nor deny to any person within its jurisdiction the equal protection of the laws.

(Emphasis supplied)

California Evidence Code section 1109 provides, in relevant part:

> (a) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

STATEMENT OF THE CASE

This case arose out of an assault in November of 1994 by petitioner Daniel Sterling on his girlfriend, Lisa Stellwagen, with whom he lived in San Francisco. Petitioner Sterling was found mentally incompetent to stand trial soon thereafter, and was committed to a state hospital, where he remained for over two years. On May 20, 1997, an information was filed against Sterling in San Francisco County Superior Court charging the following felony violations: attempted premeditated murder (California Penal Code §§ 664, 187/count I),[1] mayhem (§ 203/count II), aggravated mayhem (§ 205/count III), assault by means of force likely to produce great bodily injury (§ 245(a)(1)/count IV), willful infliction of corporal injury upon a cohabitant

[1] All references are to the California Penal Code unless otherwise indicated.

(§ 273.5/count V), and battery resulting in serious bodily injury (§ 243(d)/count VI). (CT 1-4)[2] The information also included the following enhancement allegations: personal use of a knife (§ 12022(b)) attendant to counts I, II, V, and VI; and great bodily injury (§ 12022.7(d)) attendant to counts I, II, IV, V, and VI. (CT 5) In November of 1998, the jury returned guilty verdicts on all counts charged. On February 18, 1998, petitioner was sentenced to a total prison commitment of 19 years to life. (CT 243, 245)

The prosecution, concerned about the compelling evidence of Sterling's psychosis at the time of the charged 1994 assault, introduced evidence that Sterling had earlier assaulted Lisa Stellwagen in New York in 1993. At the time of the charged assault in 1994, such evidence of a prior offense would have been inadmissible under California Evidence Code § 1101(a), which decreed that: "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." In 1996, however, two years after the charged assault, the California Legislature enacted California Evidence Code § 1109, which in essence provides that evidence of previous acts of domestic violence may be admitted in a domestic violence prosecution as

[2] "CT" refers to the Clerk's Transcript prepared for Sterling's state appeal, and "RT" refers to the Reporter's Transcript prepared for that appeal.

evidence of a defendant's propensity to commit such crimes.[3]

Under § 1109, the evidence of the 1993 New York assault was admitted against Sterling during his 1998 trial as circumstantial evidence of his mental state in committing the 1994 California assault. That fact alone might be unremarkable. But, after the evidence was placed before the jury, the trial court instructed under the then-existing version of a California form instruction, CALJIC 2.50.02, that if the jury determined Sterling committed the August, 1993 offense in New York involving domestic violence, it was free to infer that Sterling had a disposition to commit attempted premeditated murder, aggravated mayhem, and the other serious offenses with which he was charged in California, and on that basis could convict him of these charged offenses:

> Evidence has also been introduced – in again, this New York incident – for the purpose of showing the defendant engaged in an offense involving domestic violence on one occasion other than that charged in the trial.
>
> * * *
>
> If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar offense. If you find the defendant had this disposition, you may, but are not required to, infer that

[3] Section 1109 was modeled on California Evidence Code § 1108, which provides a similar exception for the admission of other sexual offenses in a prosecution for sexual misconduct.

> he was likely to commit and did commit the crime of which he is accused.

(RT 1593-94)

To make matters considerably worse, the jury also was instructed pursuant to CALJIC No. 2.50.1 that the prosecution had to prove the commission of the uncharged act of domestic violence offense by only a preponderance of the evidence:

> Within the meaning of the preceding instructions about the other incident, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed a crime other than those for which he is currently on trial.

(RT 1594)

Thus Sterling's jury was instructed that it could convict him of the California offenses on the basis of the New York incident alone by: (a) finding by a preponderance of the evidence that he committed the New York offense against Stellwagen; (b) inferring that he therefore had a disposition to assault Stellwagen; and (c) thereby concluding that Sterling "was likely to commit and did commit the crime of which he is accused." (RT 1594). Jurors who did what CALJIC 2.50.02 informed them was perfectly permissible could and would convict Sterling of the charged California offenses without ever confronting or deciding the central question raised by the evidence at trial: whether Sterling had descended into psychosis by the time he stabbed Stellwagen in November of 1994.

STATEMENT OF FACTS

There was no dispute between the parties at petitioner's state court trial that Daniel Sterling committed the act with which he was charged in his attempted murder prosecution: stabbing his girlfriend, Lisa Stellwagen, in November of 1994. Stellwagen was Sterling's girlfriend for seven years. (RT 246-247; 335) In August, 1993, Stellwagen returned home at about 2:00 a.m. Sterling grabbed her by the neck and threw her up against the wall. (RT 250-251) Sterling told Stellwagen he was going to kill her, and threw her on the floor. (RT 252-253) Stellwagen told Sterling she wanted to leave. (RT 252) He ripped off her shirt and a backpack she had been carrying, and punched holes in the walls. (RT 252)

Stellwagen and Sterling made up after the incident, and resumed their relationship. (RT 254-255) In October, 1994, the couple returned to San Francisco. On November 15, 1994, Stellwagen told Sterling she was seeing someone else, and that she did not want him around any more. (RT 260, 377-378) On November 17, 1994, they went to see the movie "Interview With A Vampire." (RT 262, 381) Later that day, Sterling told Stellwagen that he wanted to kill her and drink her blood. (RT 264, 392) Stellwagen told him she was scared and wanted to leave. (RT 265, 392) Stellwagen and Sterling continued to talk, during which they discussed separating. (RT 266) As Sterling seemed "really bothered" by the idea of separation, Stellwagen suggested that he call a suicide hotline "just so he could talk to somebody." (RT 266, 390) Sterling called the suicide hotline, but was told to call back in ten minutes. (RT 390)

Stellwagen and Sterling fell asleep between 6:00 and 8:00 a.m. in the same bed. (RT 266; 389-391) Between 3:00

and 4:00 p.m. that day, November 18, 1997, Stellwagen woke up, and noticed Sterling was in bed beside her. (RT 266) Sterling got out of bed, walked over to his backpack by the door, and pulled out a knife. (RT 267, 391) Sterling said he was going to kill her and stabbed Stellwagen repeatedly. (RT 273-274)

Sterling presented a psychiatric defense at trial, offering extensive evidence that he was too mentally ill to form the mental state required to commit the charged offenses. Defense expert Dr. George Woods, a clinical and forensic psychiatrist, opined that Sterling was suffering from a bipolar disorder, specifically a manic depressive disorder. (RT 900-901, 908) Dale G. Watson, a clinical psychologist, diagnosed Daniel as having a bipolar or manic-depressive illness type I with, at times, psychotic features. (RT 636, 642) Watson reviewed the charges, complaints, various educational records, psychiatric records of Kathleen Kennedy (Daniel's mother), various hospital and medical records from an incident when Daniel was a teenager, interviews of Stellwagen and Daniel conducted by the police, jail psychiatric records, various evaluations by mental health experts concerning Daniel's competency to stand trial, reports from Atascadero State Hospital, Patton State Hospital, and other medical records. (RT 642-643)

Kennedy, both mentally ill and an alcoholic, engaged in living fantasies. (RT 526-27) Daniel and his brother Michael took care of themselves and their mother. (RT 537) Daniel's mother committed suicide when Daniel was 20 or 21 years old. (RT 616-617) Michael committed suicide when Daniel was 14 years old. (RT 540) Shortly after Daniel moved in with his father he (Daniel) overdosed on LSD, went to Kennedy's house, and jumped out of

an upstairs window. (RT 541) Daniel was found walking around without any clothes on. (RT 589)

After Stellwagen moved out to San Francisco in 1994 to rejoin Daniel, sometime between August and November, the frequency of Sterling's telephone calls to his father increased. (RT 569) During these conversations, Daniel reported to his father that he was having supernatural experiences. (RT 570) Daniel said that he was getting messages from songs. (RT 571) Daniel told his father he could do things with his mind, such as cause earthquakes. (RT 573) He knew what people were thinking, and he knew what was happening before it happened. (RT 573)

REASONS FOR GRANTING THE PETITION

Rule 10(c) of the Rules of the Supreme Court identifies the following as a special and important reason why this Court may choose to review a decision of a United States court of appeals on certiorari:

> When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

See also Schlude v. Commissioner, 372 U.S. 128, 130 (1968) (Certiorari granted where court of appeals has misapplied or misconstrued relevant Supreme Court precedent).

Petitioner Sterling here seeks certiorari as to an issue raised by the Ninth Circuit's opinion in this matter. The

issue presented is whether the 1996 version of California form jury instruction CALJIC 2.50.02 is facially unconstitutional, indeed "an important question of federal law which has not been, but should be, decided by this Court." As demonstrated below, the very admission of propensity evidence raises due process concerns, but the far graver problem raised here is that the form instruction under challenge permits a jury to base its conviction solely on such evidence. As some courts have recognized, the instruction given here authorizes a jury to convict even absent any evidence of a defendant's commission of the charged crime.

The California appellate courts have been split deeply in deciding the constitutionality of the challenged instruction, and in this case the California Supreme Court-declined to address that conflict. Because Sterling's was the first of the dozens of habeas petitions raising the same instructional issues now being litigated in the district courts of California to reach the appellate level, district courts would benefit enormously from a Supreme Court opinion deciding the constitutionality of the 1996 version of CALJIC 2.50.02.

Furthermore, state legislation permitting juries to consider propensity evidence in domestic violence cases is proliferating across the country. Responding to such legislation, state trial courts are either considering, or have already adopted, evidentiary rules identical or markedly similar to those challenged here. Resolution of the federal constitutional issue implicated by the instructions given in this case would provide critical guidance to other states struggling to ensure that their efforts at legal innovation adhere to fundamental demands of due process under the federal constitution.

ARGUMENT

I. WHETHER THE 1996 VERSION OF CALIFORNIA FORM JURY INSTRUCTION CALJIC 2.50.02 IS FACIALLY UNCONSTITUTIONAL INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

On habeas review, the district court found the 1996 version of CALJIC 2.50.02 unconstitutional on its face, as it contained the following fundamental defects:

(1) It "focuses the jury's attention solely on past acts (and a propensity inference derived therefrom) as a basis for conviction;"

(2) "It does not adequately indicate, again taken alone, that such evidence is not enough for a finding of guilty beyond a reasonable doubt;"

(3) "In emphasizing past acts, it marginalizes evidence with much more bearing on the present case;" and

(4) "The inference, though permissive, undermines the state's burden of proving guilt beyond a reasonable doubt, and threatens to preclude consideration of relevant evidence." (App. 33)

On appeal, however, the panel disposed of Sterling's constitutional claim tersely. The entirety of its holding follows:

> A challenged jury instruction justifies habeas relief if the "instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (internal quotation marks omitted). "It is well established that the instruction 'may not be

judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Id.* (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). A jury instruction violates due process if (1) there is "'a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution," *id.* (quoting *Boyde v. California*, 494 U.S. 370, 380 (1980)); and (2) it had a substantial and injurious effect or influence in determining the jury's verdict," *Calderon v. Coleman*, 525 U.S. 141, 146-147 (1998); see also *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Even if we skip the "reasonable likelihood" analysis as Sterling suggests and assume that CALJIC 2.50.02 was unconstitutional, we hold that its use had no substantial or injurious effect. Under the "substantial and injurious effect" standard, "habeas petitioners . . . are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637 (citation omitted).

Given the evidence introduced at trial and the instructions taken as a whole, Sterling has not demonstrated "actual prejudice" in the use of CALJIC 2.50.02. The state court had instructed the jury regarding the special verdict form that they needed to determine whether Sterling had acted willfully, deliberately, and with premeditation in the commission of the crimes, and that they had to make that determination beyond a reasonable doubt. The jury's finding that he did act willfully, deliberately, and with premeditation eliminates the possibility that they found Sterling guilty based on the New York incident or by a preponderance of the evidence. Thus, the use of

> CALJIC 2.50.02 did not violate Sterling's due process rights.

(App. 2-3)

Thus in its brief opinion, the panel did not discuss or decide whether the instruction was facially unconstitutional, but rather introduced its discussion of prejudice with the phrase "[e]ven if we . . . assume that CALJIC 2.50.02 was unconstitutional. . . ." Because, as demonstrated below, a decision on the facial unconstitutionality of the 1996 version of CALJIC 2.50.02 is a necessary and utterly crucial step in resolving the issue of whether its use in a particular case was sufficiently prejudicial to merit habeas relief, district courts are very much in need of this Court's guidance on this threshold question.

A. Permitting Propensity Evidence To Be Used As Evidence Of Guilt, Much Less As The Sole Basis For Conviction, Threatens The Due Process Rights Of Defendants

This Court has defined due process as "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define the 'community's sense of fair play and decency.'" *Dowling v. United States*, 493 U.S. 342, 353 (1990) (citations omitted), U.S. Const. amends. V & XIV. The failure to observe fundamental fairness, which is essential to the concept of justice, results in a denial of due process. *See, e.g., Lisenba v. California*, 314 U.S. 219, 236 (1941); *accord Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986). The very integrity of the judicial system depends on a fair trial. *See Powers v. Ohio*, 499 U.S. 400, 413 (1991) (noting

integrity of judicial system depends on convictions or acquittals given by persons who are fair).

This Court has yet to squarely address the constitutional issues raised by the admission of propensity evidence for purposes of proving a criminal offense. *See Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991). In *Estelle*, a majority of this Court declined to rule "on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Id.* at 75 n.5. Certain members of the Court, however, have expressed doubts as to whether such rulings by state courts would pass constitutional muster. *See id.*, at 78 (O'Connor, J., concurring) (suggesting that admitting evidence of prior crimes to show disposition to commit crime charged may violate due process); *Spencer v. Texas*, 385 U.S. 554, 570, 573-74 (1967) (Warren, C.J., dissenting) (commenting that use of prior convictions to show propensity is fundamentally at odds with policies underlying due process, for it "needlessly prejudices the accused without advancing any legitimate interest of the State." *Id.* at 570); *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (suggesting that prohibition against admission of propensity evidence is mandated by Due Process Clause).

In *Old Chief v. United States*, 519 U.S. 172 (1997), this Court reasoned:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 62 L. Ed.

> 469, 38 S. Ct. 209, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. *Michelson v. United States*, 335 U.S. 469, 475-476, 93 L. Ed. 168, 69 S. Ct. 213 (1948) (footnotes omitted).

Id. at 181-82

Professor McCormick states: "The rule is that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character." McCormick, Evidence § 157 (1954 ed.). Dean Wigmore agrees with this statement of the general rule of exclusion, 1 Wigmore, Evidence §§ 193-194 (3d ed. 1940). As Wigmore points out, evidence of prior crimes is objectionable, not because it is not somewhat probative, but because the jury is likely to give it more weight than it deserves and might decide that the defendant deserves to be punished because of the past crime without regard to whether he is guilty of the crime currently

charged. Cited in *Spencer v. Texas*, 385 U.S. 554, 575, n.3 (1967) (C.J. Warren, dissenting)

Many circuit courts have expressed similar skepticism, if not outright rejection, of the constitutionality of permitting a jury to base a conviction on evidence of past offenses. The Fifth Circuit in *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977) has noted that a "[a] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *Id.* at 1044. In *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948) the Fourth Circuit Court of Appeals commented "the rule which . . . forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence." *Id.* at 389. *See also Government of the Virgin Islands v. Archibald*, 987 F.2d 180, 185 (3d Cir. 1993) (it was highly likely that the jury drew an adverse character inference from evidence that defendant had intercourse with another minor); *United States v. Has No Horse*, 11 F.3d 104, 106 (8th Cir. 1993) (other crimes cannot be admitted to prove propensity); *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980) (evidence of a defendant's prior "bad acts" is excluded when its sole tendency is to prove that the defendant is a person of bad character and thus predisposed to commit the crime for which he is on trial).

State courts traditionally have excluded propensity evidence in sexual assault cases. *See, e.g., Vaughn v. State*, 604 So. 2d 1272, 1272-73 (Fla. Dist. Ct. App. 1992) (excluding evidence of prior rape); *Reichard v. State*, 510 N.E.2d

163, 165-66 (Ind. 1987) (holding trial court erred in admitting propensity evidence of prior rapes); *Brown v. State*, 459 N.E.2d 376, 379 (Ind. 1984) (concluding trial court committed reversible error by admitting testimony regarding other rapes committed by accused); *People v. Sanza*, 509 N.Y.S.2d 311, 314-15 (N.Y. App. Div. 1986) (determining evidence that accused previously raped three individuals was inadmissible); *White v. Commonwealth*, 388 S.E.2d 645, 647 (Va. Ct. App. 1990) (holding evidence of prior sexual assault inadmissible), overruled on other grounds sub nom. *Lavinder v. Commonwealth*, 407 S.E.2d 910 (Va. Ct. App. 1991); *State v. Satarelli*, 655 P.2d 697, 700-01 (Wash. 1982) (concluding trial court should have excluded evidence of prior rape by defendant charged with acquaintance rape).

The constitutionality of the use of propensity evidence to convict has assumed great importance recently, however, in the light of recent legislative changes in California and elsewhere. Arizona, for instance, has amended Rule 404, its propensity rule. *See* Ariz. Rev. Stat. Ann. § 404. The provision, while relatively new, has been cited in only one reported opinion. *See State v. Arner*, 988 P.2d 1120 (Ariz. Ct. App. 1999). The Alaska legislature embodied propensity provisions in Alaska Rule of Evidence § 404. *See* Alaska R. Evid. §§ 404(a)(2), 404(b)(2), 404(b)(3), and 404(b)(4). Propensity evidence is used in cases of aggressive behavior, *see* Alaska R. Evid. § 404(a)(2), child abuse, *see id.* § 404(b)(2), sexual assault, *see id.* § 404(b)(3), and domestic violence, *see id.* § 404(b)(4). The Alaska Supreme Court has not yet ruled on the constitutionality of the propensity provisions. *Hess v. State*, 20 P.3d 1121 (Alaska 2001).

B. The Challenged Instruction On Propensity Evidence Has Produced A Conflict In Published Authority That Warrants Resolution By This Court

In the wake of California's enactment of Evidence Code section 1108 and 1109 permitting propensity evidence in sexual assault and domestic violence cases, several California appellate courts have held that jury instructions similar or identical to those at issue in this case are facially unconstitutional. In *People v. Vichroy*, 76 Cal.App.4th 92, 98 (1999), the Second District Court of Appeal considered the validity of a version of CALJIC No. 2.50.01. Following the admission of uncharged sexual offense evidence under Evidence Code § 1108, the jury was instructed:

> If you find *beyond a reasonable doubt* that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type of sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime [or crimes] of which [he] is accused.

76 Cal.App.4th at 98-99 (emphasis added).

Citing *In re Winship*, 397 U.S. 358 (1970), the *Vichroy* court reversed, holding that:

> The constitutional infirmity arises in this case because the instruction permitted the jury to find appellant guilty of the current charges solely because he had committed prior sexual offenses. CALJIC No. 2.50.01, as given, required no proof at all of the current charges.

Id. at 99; *see also People v. Orellano*, 79 Cal.App.4th 179, 186 (2000) (use of CALJIC 2.50.01 requires reversal).

The constitutionality of the California jury instruction regarding the inferences to be drawn from evidence of prior offenses was analyzed exhaustively in *People v. James*, 81 Cal.App.4th 1343, 1352-1357 (2000). The *James* court began:

> [d]ue process demands that each element of a charged offense be proven beyond a reasonable doubt. *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *People v. Sakarias* (2000) 22 Cal.4th 596, 623. We believe that right is substantially eroded by instructions suggesting that a defendant's prior offenses may be sufficient to convict him of the charged crime.

Id. at 1352-53.

James then focused on the manner in which the instruction was constitutionally offensive:

> We think it reasonably likely the jury harmonized the instructions on the burden of proof, the elements of the offense, the consideration of all evidence, and the inference of guilt from propensity by concluding James's propensity was sufficient to establish the elements of the charged offense beyond a reasonable doubt, regardless of the strength or weakness of the other evidence. Three hundred years of jurisprudence recognizes juries are particularly susceptible to that suggestion. [Citation] *If the court seems to approve a faster and shorter path to conviction, which coincides with the natural inclination to assume guilt from propensity, it is unrealistic to believe the*

> *jury will correct the wrong turns in that path by reasoning from other, more general instructions.*

Id. at 1354 (emphasis added).

The *James* court continued:

> Other crimes evidence can support an inference of propensity, but propensity alone cannot support a conclusive inference that the defendant committed the charged offense. Evidence connecting the defendant to the current offense is required, or any member of the criminal population with similar prior offenses who is unable to establish an alibi might be convicted of the charged offense based on propensity. The plain terms of former CALJIC No. 2.50.01 permit such an unconstitutional result.

Id., at 1354-55; *see also People v. Younger*, 84 Cal.App.4th 1360, 1379-80 (2000) (defendant's conviction for murdering his lover reversed because of evidence of past domestic violence and use of CALJIC 2.50.0) As the *Younger* court held:

> A jury cannot fail to understand that if it determines the defendant has committed other similar offenses, it may infer that he was disposed to commit *and did commit* the charged offense. The inference of guilt is as faulty as it is unambiguous; neither prior offenses nor propensity prove guilt of a charged offense.

Id. at 1381-82 (emphasis in original). While the jury in *Younger* was given other instructions on proof beyond a reasonable doubt, the court held that they could not cure the constitutional defect, because "none of them restrains the jury from accepting the court's invitation to conclude

that because the defendant did it before, he did it again." *Id.* at 1382.

In *People v. Frazier*, 89 Cal.App.4th 30 (2001), the Court of Appeal held:

> CALJIC No. 2.50.01 [to be] constitutionally infirm because it instructed the jurors they could convict defendant of the current charges based solely on their determination he had committed prior sexual offenses. No other instruction effectively countered this misstatement of law.
>
> We begin our analysis by noting former CALJIC No. 2.50.01 was unambiguous in its language. It told the jury if it determined the defendant committed other sexual offenses it could "infer that he was likely to commit *and did commit* the crime of which he is accused."

Id. at 35-36.

In finding federal constitutional error, *Frazier* relied on two other factors equally applicable to this case. First, "[n]o instruction made up for the essential element missing from former CALJIC No. 2.50.01: an explanation to the jury it could not consider evidence of prior sexual offenses sufficient for a finding of guilt on the charged offenses." *Id.* Second:

> CALJIC No. 2.50.01, permitting the jury to infer defendant's guilt from his prior sex offenses, was immediately followed by CALJIC No. 2.50.1 which told the jury to apply the preponderance of the evidence standard to determine whether defendant had committed the prior offenses. CALJIC No. 2.01, on the other hand, told the jury each fact supporting an inference essential to establish guilt must be proven beyond a reasonable

> doubt. If the jury believed the propensity evidence was essential to establish defendant's guilt, then CALJIC No. 2.01 was in direct conflict with CALJIC No. 2.50.1.
>
> Given the confusion which results from attempting to apply the court's instructions "as a whole," it would be very tempting for a jury to take the path of least resistance which leads directly from evidence of the defendant's disposition to a guilty verdict and thereby avoids the troubling waters represented by the remainder of the evidence and instructions. Such a deliberative process is reasonably likely given the strong appeal of propensity evidence, particularly where the other evidence is closely balanced or there is disagreement among the jurors over the strength of the other evidence.

Id. at 36-37.

Numerous other California appellate court opinions, however, have found that the instructions at issue here do not necessarily violate a defendant's federal due process rights. *See, e.g.*, *People v. Jeffries*, 83 Cal.App.4th 15, 23-24 (2000), and cases cited therein. The California Supreme Court declined to resolve this conflict, and thus the many defendants whose constitutional claims were denied under the *Jeffries* line of cases have turned to the federal courts for habeas relief. The lower federal courts that must decide these claims would benefit enormously from an opinion addressing the important due process issues raised by the challenged instruction on propensity evidence.

CONCLUSION

For the reasons stated, the Court should grant the instant petition and order briefing and argument on the case in this Court.

Dated: July 15, 2003

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL STERLING, Petitioner-Appellant, v. ERNEST C. ROE, Warden, Respondent-Appellee.	No. 02-16129 D.C. No. CV-01-03809-WHA MEMORANDUM* (Filed Feb. 26, 2003)

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, District Judge, Presiding

Argued and Submitted February 11, 2003
San Francisco, California

Before: TROTT, RYMER and TALLMAN, Circuit Judges.

Daniel Sterling ("Sterling") appeals from the district court's denial of his habeas corpus petition. The district court held that (1) the California state court's use of pattern jury instruction CALJIC 2.50.02 did not violate Sterling's federal due process rights, and (2) the combined impact of CALJIC 2.50.02 and Cal. Evid. Code § 1109 did not violate the Ex Post Facto Clause. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

I

Sterling first argues that CALJIC 2.50.02 allowed the jury to convict him based solely upon finding by a preponderance of the evidence that he had previously engaged in uncharged acts of domestic violence in New York. We find no error sufficient to grant habeas relief.[1]

A challenged jury instruction justifies habeas relief if the "instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire,* 502 U.S. 62, 72 (1991) (internal quotation marks omitted). "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Id.* (quoting *Cupp v. Naughten,* 414 U.S. 141, 147 (1973)). A jury instruction violates due process if (1) there is " 'a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution," *id.* (quoting *Boyde v. California,* 494 U.S. 370, 380 (1990)); and (2) it "had a substantial and injurious effect or influence in determining the jury's verdict," *Calderon v. Coleman,* 525 U.S. 141, 146-47 (1998); *see also Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993).

Even if we skip the "reasonable likelihood" analysis as Sterling suggests and assume that CALJIC 2.50.02 was unconstitutional, we hold that its use had no substantial or injurious effect. Under the "substantial and injurious

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[1] Sterling's structural due process argument raised for the first time on appeal "is waived because it was not raised in his federal habeas petition." *Cooper v. Calderon,* 255 F.3d 1104, 1110 (9th Cir. 2001); *see also Belgarde v. Montana,* 123 F.3d 1210, 1216 (9th Cir. 1997).

effect" standard, "habeas petitioners . . . are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht,* 507 U.S. at 637 (citation omitted).

Given the evidence introduced at trial and the instructions taken as a whole, Sterling has not demonstrated "actual prejudice" in the use of CALJIC 2.50.02. The state court had instructed the jury regarding the special verdict form that they needed to determine whether Sterling had acted willfully, deliberately, and with premeditation in the commission of the crimes, and that they had to make that determination beyond a reasonable doubt. The jury's finding that he did act willfully, deliberately, and with premeditation eliminates the possibility that they found Sterling guilty based on the New York incident or by a preponderance of the evidence. Thus, the use of CALJIC 2.50.02 did not violate Sterling's due process rights.

II

Sterling next argues that the combination of CALJIC 2.50.02 and Cal. Evid. Code § 1109 violated the Ex Post Facto Clause. Sterling argues that a statute permitting the use of a form of evidence that was inadmissible at the time of the commission of the offense violates the Ex Post Facto Clause when it is combined with an instruction deeming that form of evidence as sufficient to support a conviction. This argument fails in his case. A law has an impermissible ex post facto effect if it alters the legal rules of evidence, and less or different testimony is needed to convict the offender than the law required at the time of the commission of the offense. *Carmell v. Texas,* 529 U.S.

513, 530 (2000). As we already concluded, considering the entire trial and the instructions as a whole, there is no possibility that the jury convicted Sterling based solely on evidence of the New York incident. Thus, CALJIC 2.50.02 did not alter the quantum of proof necessary to obtain Sterling's conviction, and the Ex Post Facto Clause was not violated.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL STERLING,

Petitioner,

v.

ERNIE ROE, Warden, and THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondents. /

No. C 01-03809 WHA

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

(Filed Apr. 22, 2002)

INTRODUCTION

In this habeas case, petitioner argues the writ should issue because a fundamentally faulty jury instruction, the former CALJIC 2.50.02, fatally compromised a verdict that found him guilty of several crimes. Petitioner also contends that the use of this instruction violated the Ex Post Facto Clause. This order concludes that given the facts of petitioner's case, he is not entitled to relief. His petition is therefore **DENIED**. Judgment will be entered on behalf of respondents.

STATEMENT

Petitioner Daniel Sterling and his victim, Lisa Stellwagen, were high-school sweethearts (RT 247-48). They met in upstate New York, and lived together there for several years (RT 247-49). Their relationship was interrupted by one act of violence, in August 1993. As Stellwagen returned to the home she shared with Sterling at approximately 2:00 a.m. one morning, petitioner grabbed

her by the neck and threw her up against a wall (RT 250-51). Telling her he was going to kill her, petitioner then threw her on the floor and ripped off her shirt (RT 252). Stellwagen ran to a neighbor's yard, where she hid under a tree. She then went to petitioner's father's house (RT 253). Stellwagen did not seek medical attention and the incident was never reported to the authorities. She and petitioner soon resumed their relationship (RT 255).

Not long thereafter, in September 1993, Stellwagen and petitioner moved to San Francisco. Stellwagen returned to New York alone a few months later, in November 1993 (RT 255). She still spoke with petitioner frequently over the phone, and in 1994 moved back to San Francisco to be with him (RT 256). In September 1994, at petitioner's urging the two returned to New York. They were in New York for approximately one month before relocating once again to San Francisco (RT 368-373). As of fall 1994, petitioner had begun to spend more of his time reading books about the occult (RT 363). Stellwagen, for her part, had grown unhappy with the relationship and spoke to petitioner about breaking up or seeing other people (RT 256). She placed a personal ad in the paper seeking a new boyfriend (RT 257-58).

In November 1994, petitioner left San Francisco on a short camping trip. While petitioner was away, Stellwagen met another man, Jeremy Wiles (RT 259). Speaking over the phone with petitioner on November 15, 1994, Stellwagen told him that she wanted to break off their relationship because she was now seeing someone else. Petitioner told her, "You'll get what's coming to you, be prepared for the backlash." Stellwagen told petitioner to leave her alone (RT 260). The next day, petitioner returned to their apartment. He noticed that Stellwagen was

wearing a ring that Wiles had given her, and told her to take it off (RT 261). The next day, however, petitioner and Stellwagen were on friendly terms (RT 262). The two saw a movie together in the afternoon. When they returned to the apartment, Stellwagen telephoned Wiles to make plans with him for the evening (RT 262). Petitioner urged Stellwagen not to go, but she left at about 8:00 p.m. (RT 262-63).

Stellwagen returned to the apartment at approximately 2:00 a.m. on the morning of November 18, 1994. Defendant appeared angry. The two talked about finding work for petitioner and ending their relationship (RT 263, 265). At one point in the conversation, petitioner said that he wanted to kill Stellwagen and drink her blood (RT 264). Stellwagen did not know whether he was joking or not, since the two had seen the movie "Interview with the Vampire" the previous day, and that he also told Stellwagen that he loved her and would not hurt her (RT 264).

After talking with petitioner for several hours, Stellwagen fell asleep sometime between 6:00 and 8:00 a.m. on November 18 (RT 266). When she awoke between 3:00 and 4:00 p.m., she saw petitioner rise up from their bed, walk over to the door, pull out a knife from his backpack, and start to walk toward her (RT 267-270). Petitioner told her that she was going to die that night (RT 270). Stellwagen screamed as petitioner straddled her (RT 271-72). Petitioner then stabbed Stellwagen several times in the back, arm and chest (RT 274, 275). While trapped under petitioner, Stellwagen heard knocking on the apartment door (RT 275). Petitioner placed his hand over her mouth (RT 276-77). The inquirers, neighbors who had heard Stellwagen's initial scream, left at that point (RT 227). In all,

petitioner stabbed Stellwagen nine times. The last time, he turned the knife inside the wound (RT 278).

Petitioner told Stellwagen he was attacking her because he knew she did not love him anymore. He put his mouth on one of her chest wounds and licked her blood (RT 279). Petitioner also asked Stellwagen, "What does it feel like to die?" Stellwagen told him that she felt weak and could not move her arm (RT 280). Petitioner then asked her, "Am I (petitioner) going to be okay?," to which Stellwagen replied that she did not care (RT 281-82). Petitioner agreed to call an ambulance for Stellwagen if she would tell the police that an African-American intruder, not petitioner, had stabbed her (RT 282-83). Stellwagen said she would. Prior to calling 911, petitioner wrapped Stellwagen's hand around the handle of the knife (RT 283). Petitioner, at Stellwagen's request, also got her a wet cloth and helped her take off her sweatshirt (RT 407-08).

The police responded to the 911 call. Petitioner told an arriving officer that an African-American male weighing 180-200 lbs. and standing six feet, three inches in height had entered the apartment and stabbed Stellwagen (RT 444). Petitioner appeared calm to the arriving officers (RT 452). Shortly thereafter, petitioner was arrested.

* * *

By information filed on May 20, 1997, in San Francisco County Superior Court, petitioner was charged with attempted murder (California Penal Code §§ 664, 187) (Count I); mayhem (California Penal Code § 203) (Count II); aggravated mayhem (California Penal Code § 205) (Count III); assault by means likely to produce great bodily injury (California Penal Code § 245(a)(1)) (Count

IV); willful infliction of corporal injury on a cohabitant (California Penal Code § 273.5) (Count V); and battery resulting in serious bodily injury (California Penal Code § 243(d)) (Count VI). It was alleged that the crime of attempted murder was "willful, deliberate and premeditated action," a "penalty provision" under California law. The information also included the enhancement allegations of personal use of a knife (California Penal Code § 12022(b)), attendant to Counts I, II, V and VI; and great bodily injury (California Penal Code § 12022.7(d)), attendant to Counts I, II, IV, V and VI. On May 21, 1997, petitioner pleaded not guilty to all charges and denied all enhancement allegations.[1]

At petitioner's state-court trial, the prosecution presented as witnesses in its case-in-chief Stellwagen, who testified to the facts above; a police officer summoned to the scene, who testified that petitioner was acting calmly at that time; an examining physician; and a neighbor who heard Stellwagen's scream and knocked on her door, but left after concluding nothing was wrong.

Significantly, the defense did not dispute that petitioner had stabbed Stellwagen. Rather, the defense's principal argument was that petitioner suffered from a bipolar disorder that prevented him from formulating the specific intent necessary to the crimes of attempted murder (intent to kill) and aggravated mayhem (intent to maim and to vex), the two most serious crimes with which

[1] Before trial, the state court granted petitioner's motion to set aside the information as to the Section 12022.7(d) allegations of Counts II and VI.

he was charged. Petitioner's first two witnesses were his grandmother and father, who testified as to petitioner's troubled family history. Petitioner's brother committed suicide; his mother abused alcohol and died of a drug overdose (a probable suicide) (RT 538, 616-17). As a youth, petitioner overdosed on LSD and jumped out of a window (RT 541). Petitioner's father reported that beginning in summer 1994 petitioner began to "get messages" from songs and other sources (RT 571, 577). The defense also called Dale Watson, a psychologist. Watson testified that he diagnosed petitioner with a bipolar disorder, a manic-depressive condition that at times had been with psychotic features and at other times without them (RT 642, 898). Watson said that this illness "waxes and wanes," and he did not testify as to whether petitioner was affected by it when he stabbed Stellwagen (RT 814). Dr. George Woods, a psychiatrist and another defense witness, also testified that petitioner suffered from a bipolar disorder (RT 908, 978). He opined that when he committed the offenses, petitioner suffered from "impaired thinking" from the "psychosis of the bipolar disorder" (RT 1211). Petitioner himself did not testify.

The prosecution, in rebuttal, presented expert testimony that petitioner was not seriously mentally ill, only malingering (RT 1314, 1471). The prosecution's experts were psychiatrist David Kessler, who testified that petitioner was not bipolar or manic when he stabbed Stellwagen (RT 1303-04, 1325), and psychologist Ronald Roberts, who testified that he diagnosed petitioner with a "personality disorder not otherwise specified," specifically the "antisocial trends" of a "narcissistic personality disorder and of a schizotypal personality disorder" (RT 1464). According to Roberts, these disorders did not amount to a

psychotic diagnosis. Both Dr. Kessler and Roberts had attempted to interview petitioner. Petitioner terminated his interview by Dr. Kessler before it was complete (RT 1292-96), and declined to be interviewed by Roberts (RT 1459). Both of petitioner's experts had conducted full interviews with him, although he sometimes became difficult during the examinations.

The court gave the jury preliminary instructions at the beginning of the trial. Among other things, the jurors were told to consider all instructions in unison, not single out one or another (RT 112). Substantive instructions were given after the parties rested. Since these instructions are central to petitioner's claim and the resolution of his petition, pertinent provisions are excerpted in detail below. The allegedly defective jury instruction, modeled after the form instruction CALJIC 2.50.02, is italicized (RT 1586-1607):[2]

> Now, if any rule, direction or idea is repeated or stated in different ways in these instructions, no emphasis is intended and you must not draw any inference because of its repetition.
>
> Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider these instructions as a whole and in light of all the others.

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[2] These excerpts are taken from the trial reporter's transcript. A written copy of the instructions was also provided to the jury. The written copy's text does not deviate materially from the judge's oral instructions.

Now, the order in which the instructions are given has no significance as to their relative importance.

* * *

Now, the specific intent with which an act is done may be shown by the circumstances surrounding the commission of that act. However, you may not find this defendant guilty of the crimes charged in Counts One and Three, namely, the crime of attempted murder in Count One, and aggravated mayhem in Count Three, unless the proved circumstances are not only, number one, consistent with the theory that the defendant had that required specific intent for those crimes, but, number two, cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any specific intent for those two charges permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state for those two crimes, and one of which points to its absence, you must adopt that interpretation which points to its absence.

* * *

Now, you should give the testimony of a single witness whatever weight you think it deserves. The testimony of one witness which you believe on a particular fact is sufficient to prove that fact. You should carefully review all the evidence upon which the proof of that fact depends.

Now, evidence has been introduced for the purpose of showing the defendant committed a crime other than that for which he is on trial in this

case. And by that, I'm talking about the incident that happened in New York state in '93.

This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crime. It may be considered by you only for the limited purpose of determining if it tends to show:

The existence of the intent which is a necessary element of the crimes charged;

Or as a motive for the commission of the crimes charged;

For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in this case.

* * *

Evidence has been introduced – in again, this New York incident – for the purpose of showing the defendant engaged in an offense involving domestic violence on one occasion other than that charged in the trial.

Now, domestic violence means abuse committed against an adult who is a spouse, former spouse, cohabitant, or former cohabitant. . . .

If you find that the defendant committed a prior offense involving domestic violence, you may, but you are not required to, infer that a defendant had a disposition to commit the same or similar offense. If you find that the defendant had this

disposition, you may, but you are not required to, infer that he was likely to commit and did commit the crime with which he is accused.[3]

You may only consider this incident in New York for the additional issue of intent and motive, as I discussed just previously in instruction 2.50. Do not consider this evidence for any other purpose.

Now, within the meaning of these instructions about the other incident, the prosecution has the burden of proving by a preponderance of the evidence that the defendant committed a crime other than those for which he is currently on trial.

You must not consider this evidence for any purpose unless you find, by a preponderance of the evidence, that the defendant committed that other incident.

Now, "preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

* * *

Now, a defendant in a criminal trial has a constitutional right not to be compelled to testify. You

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[3] Petitioner's trial counsel objected to this instruction (RT 1101).

must not draw any inference from the fact that the defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the people to prove beyond a reasonable doubt every essential element of the crimes charged against him. No lack of testimony on the defendant's part will make up for the failure of proof by the people so as to support a finding against him on any such essential element.

* * *

Now, a defendant in a criminal case is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.

Now, "reasonable doubt" is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. Rather, it is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

Now, in the crimes charged of mayhem, Penal Code Section 203, aggravated assault, Section 245(a)(1), willful infliction of corporal injury on a cohabitant, 273.5(a), and battery causing serious injury, 243(d), charged in Counts Two, Four, Five

and Six, there must exist a union or joint operation of act or conduct and general criminal intent. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with the general criminal intent, even though he may not know his act or his conduct is unlawful.

Now, in the crimes charged in Counts One and Three, namely, attempted murder and aggravated mayhem, there must exist a union, or joint operation of act or conduct, and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime to which it relates is not committed.

The specific intent required is included in the definition of the crimes set forth elsewhere in these instructions for the two crimes.

Now, the crime of attempted murder requires the specific intent to kill.

The crime of aggravated mayhem requires the specific intent to disfigure permanently.

In the crime charged in Count One, attempted murder, there must exist a union or joint operation of act or conduct and a certain mental state also in the mind of the perpetrator. Unless this mental state exists, the crime to which it relates is not committed.

Now, the mental state required for the crime of attempted murder as alleged in Count One of the information is express malice, and that element is defined in these instructions dealing with that Count.

Now, you have received evidence regarding a mental disease or disorder of the defendant at the time of the commission of the crime charged in Count One, attempted murder, and Count Three, aggravated mayhem, and the lesser offenses of Count One, which would be attempted voluntary manslaughter.

You can consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent or mental states required for those particular offenses and enumerated in the instructions for those crimes. These mental states are elements of those particular offenses which the prosecution must prove beyond a reasonable doubt.

During the course of this trial, the defendant was ordered by the court to submit to a psychiatric examination by mental health experts selected by the prosecution. If you find that the defendant refused to be examined by those experts and that his refusal was done willfully, you may take such determinations into consideration when you weigh the opinions of the experts presented by the defense in this case.

* * *

Now, the defendant is accused in Count One of the information of having committed the crime of attempted murder, in violation of Penal Code Sections 664 and 187.

Every person who attempts to murder another human being is guilty of a violation of Penal Code Sections 664 and 187.

Murder is the unlawful killing of a human being with malice aforethought.

In order to prove attempted murder, each of the following elements must be proved:

Number One. A direct but ineffectual act was done by one person towards killing another human being; and

Number Two. The person committing the act harbored express malice aforethought; namely, a specific intent to kill unlawfully another human being.

* * *

Now, Count One has an additional feature, as alleged, and that is, that in the commission of the crime alleged in Count One, the attempt was willful, deliberate, and premeditated murder. And if you find the defendant guilty of attempted murder, you must determine whether this allegation of willful, deliberate and premeditation is true or not true.

Now, "willful" means intentional. "Deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of the considerations for and against the proposed course of action. "Premeditated" means considered beforehand.

Now, if you find that the attempted murder was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is an attempt to commit willful, deliberate, and premeditated murder. . . .

The people have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

You will include a special finding on that question in your verdict using a form which will be supplied for that purpose.

* * *

Aggravated mayhem is alleged in Count Three. And aggravated mayhem is a violation of Section 205 of the Penal Code.

Every person who unlawfully, under circumstances manifesting extreme indifference to the physical or the psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being is guilty of the crime of aggravated mayhem in violation of Penal Code Section 205.

In order to prove this crime, each of the following elements must be proved:

Number One. One person intentionally and unlawfully caused another person to sustain permanent disability or disfigurement.

Number Two. The person who inflicted the injury did so with the specific intent to permanently disfigure or disable.

Number Three. The person who inflicted the injury did so maliciously; that is, with an unlawful intent to vex, annoy, or injure another person.

Number Four. That person engaged in the conduct under circumstances which demonstrated his extreme indifference to the physical and

> psychological well-being of the person subsequently injured.
>
> * * *

After these instructions, the prosecutor and defense counsel gave closing statements to the jury. Both stressed the importance of finding petitioner guilty beyond a reasonable doubt. The prosecutor told the jury (RT 1620, 1695):

> The other most important instruction that I would like to begin with is the burden of proof instruction. And I just want to make sure that everyone's clear, because it's really important. The burden of proof was right here with me right at this table. It was not over there with this defendant. I had the burden of proof, and that's how our system works, and it's a good system. It's been working well for hundreds of years. And I had the burden to prove this defendant guilty simply beyond a reasonable doubt. . . .
>
> And this burden of proof instruction is a very, very wise instruction. It is the foundation of our criminal justice system, and it sets the parameters for all of your deliberations. It tells you what my burden is, and it tells you what my burden is not.
>
> * * *
>
> [T]he truth is that he is guilty. He is guilty beyond a reasonable doubt as to each of the charges that are before you.

Petitioner's counsel also emphasized the reasonable-doubt standard in her closing argument (RT 1665, 1682-83):

There are several counts. And those charges all have different, distinct elements to them. The crimes of attempted murder and aggravated mayhem have a special and distinct element of specific intent. They have a higher mental element state of mind that the prosecution has to prove in this case before you can render verdicts of guilty on those counts.

And the other charges, including the lesser included charges in all of the six counts, also have distinct elements that the prosecution must prove to you beyond a reasonable doubt.

[The] prosecutor, she told you she has the burden of proof. She doesn't have to call all of the witnesses involved in the case. But certainly, she has the burden of proof, and that burden of proof of proving each and every element of every charge to you remains on her throughout the case, period.

* * *

But what I'm going to – what I want to emphasize is that instruction that the judge read to you at the beginning of the case, which the prosecutor read to you in her opening remarks to you, and that is, the presumption of innocence and the burden of proof. And we all mention it because it is so important. And it is so important that I'm going to read it to you again. And that is, the definition of reasonable doubt. . . .

You have to find beyond a reasonable doubt – and the burden is always on the prosecution, as she recognized, each and every element of the charges.

In their closing arguments, both the prosecutor and defense counsel emphasized the evidence concerning petitioner's mental condition and its relation to the specific charges against him. The prosecutor walked through the jury instructions applicable to each individual crime with the jury and discussed in detail the mental elements (or lack thereof) the state had to prove with each (RT 1624-1645). She also commented at length on the medical evidence and expert testimony going to petitioner's mental condition (RT 1645-49). The defense argued that petitioner's mental condition meant he could not form the specific intent necessary to prove the charges of aggravated murder and aggravated mayhem (RT 1665, 1676-78). As to the other charges against petitioner, the defense focused on the (allegedly insufficient) severity of the wounds for the mayhem count (1678-79) and the (allegedly missing) "cohabitation" element of the Section 273.5 charge (RT 1680-81). With regard to the other two counts, the defense argued that the sentencing enhancements did not apply (RT 1683).

Both the prosecutor and the defense also mentioned the August 1993 incident in their closing remarks. The prosecutor raised it first, in the context of extended remarks concerning the existence of a specific intent to kill (RT 1628):

> And motive is very, very important in this case, because motive proves that this defendant tried to stab his intimate partner of seven years willfully, deliberately, and with premeditation.
>
> The fact that he was in a relationship with her for seven years, the fact that this relationship involved violence in August of 1993, when he shoved her up against the wall, when he tried to

> choke her, when he threatened to kill her at that time, when he ripped off her blouse and she had to run out of the house, the fact that she stayed with him after that, the fact that he said he wanted an open relationship, the fact that she wrote out a personal ad, the fact that she was unhappy, and the fact that she started seeing another man and she told him that, that proves motive, and in this case, it proves premeditation and deliberation on his attempted murder.

The prosecutor also told the jury that domestic violence "happens more than once" (RT 1649), but never did she say that the August 1993 incident could serve as the sole or exclusive basis for a conviction.

In her closing argument, petitioner's counsel discussed the August 1993 incident as follows (RT 1670):

> Now, there was the incident of November (actually August) of 1993. And as the judge indicated, you can consider that evidence, if you want, if it goes to motive to show intent to kill, an actual motive and actual intent to kill.

The prosecutor, in her rebuttal, then clarified her earlier remarks regarding the August 1993 incident (RT 1692-93):

> When we talk about attempted murder, there needs to be express malice aforethought, and that's a different concept. And that is the specific intent to kill.
>
> Now, there was the insinuation that there is no specific intent to kill in this case. Well, maybe I heard a different jury trial. No specific intent to kill? "Tonight you're going to die. I want to kill you and drink your blood." Going over and

saying, "Is anyone coming over tonight?" And then particular (sic) picking up the knife and stabbing another human being nine times and then saying, "describe what it feels like to die."

No specific intent, ladies and gentlemen, taking that knife handle and wiping off the blade and taking Lisa's hands and wrapping it around the blade so her fingerprints will be on it as he's telling the 911 operator that some other guy did this? No specific intent? Maybe I heard a different trial.

Now the August '93 incident, I'm not suggesting that in the August '93 incident, the defendant, at that time, was planning to kill Lisa Stellwagen. What I'm suggesting is that in '93, he was also jealous of her. He didn't like the fact, and it came out on the witness stand from the defendant's own father that she was seeing someone else, or he thought she was going out on another date with someone and he was jealous.

And the real significance of the defendant shoving her up against a wall and choking her and threatening to kill her is the fact that he gets jealous. He wants to do what he wants to do when he wants to do it, but when she does something, in terms of another man or a relationship, he gets jealous.

And the August '93 incident is very, very important, because it shows motive. And as I said before, the motive in this case is significant in terms of willful deliberation and premeditation. He wasn't premeditating this murder since August of '93, but when he found out in 1994 that she was seeing another man, he started thinking

> about it. And he told her to beware of the backlash, and he was jealous, and he didn't want her to wear the ring on November 17th, and on November 17th, he didn't want her to go out with another man. And he's contemplating it.
>
> And, again, I can't tell you word for word what he was thinking, from 8:00 in the evening until 2:00 in the morning, when she comes home. But he lets her know. He lets her know. "I want to kill you." He's turning it over in his head. He's thinking about it. He's weighing the consequences of it . . .

Again, neither the prosecution nor the defense ever advised the jury that it could rely solely on the August 1993 incident to convict petitioner of any of the crimes with which he was charged.

After closing argument, the court provided further final instructions to the jury. Among them, he instructed the jury that (RT 1699):

> As I indicated to you, in assessing the number of charges in this case, on Count One, the charge is attempted murder. There is an allegation of willful, deliberate and premeditated attempted murder. So you have to evaluate that full charge. You have to evaluate whether the government has proved beyond a reasonable doubt the allegation of willful premeditation and deliberation. You have to find that as true or not true. Then you have to consider whether they've proven the charge of attempted murder.

After deliberating for approximately four hours and fifteen minutes, the jury returned with a conviction on all counts and, in response to separate questions within the

special verdict form, found all enhancements applicable (CT 197). On February 18, 1998, petitioner was sentenced to a total prison commitment of 19 years to life.

Petitioner's convictions were affirmed on direct appeal by the court of appeal on November 15, 1999. The California Supreme Court denied his petition for review on January 25, 2000. Petitioner filed a verified petition for writ of habeas corpus in the California Supreme Court on February 2, 2001. That petition raised petitioner's ex post facto claim for the first time. It was summarily denied on July 25, 2001. This petition followed.

ANALYSIS

Petitioner attacks his conviction on two related grounds. First, he claims that the jury instruction in his case that was modeled after the former CALJIC 2.50.02 "short-circuited" other, correct jury instructions regarding the state's obligation to prove him guilty beyond a reasonable doubt and the obligation of jurors to consider all of the evidence in his case. His second claim is that the combined application of CALJIC 2.50.02 and California Evidence Code Section 1109 (which permits the use of "other-offense evidence" in domestic violence cases) violated the Ex Post Facto Clause, since both Section 1109 and CALJIC 2.50.02 only became effective after petitioner had stabbed Stellwagen.

This order rejects both of petitioner's arguments. Given the facts involved in petitioner's case, there is no reasonable likelihood that the jury interpreted the instruction as authorizing conviction on an impermissible level of proof or as precluding consideration of relevant evidence. As a result, petitioner's ex post facto argument also fails.

1. Standard of Review.

This petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under AEDPA, an application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a state court shall not be granted with respect to any claim already adjudicated on the merits in state court proceedings unless the adjudication of that claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. 2254(d).

As used in AEDPA, "contrary to" and "involve an unreasonable application of" federal law have somewhat distinct meanings, though they may also overlap. A state court's decision is contrary to federal law if it fails to apply the correct controlling authority or if it applies the correct controlling authority incorrectly to a case involving facts "materially indistinguishable" from those in the controlling decision. A state court's decision involves an unreasonable application of federal law if it correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or if it extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Williams v. Taylor,* 529 U.S. 362, 405-12 (2000); *Van Tran v. Lindsey,* 212 F.3d 1143, 1150 (9th Cir. 2000). "Unreasonable" is not the same as incorrect. It is instead comparable to the "clear error" standard – *i.e.,* reversal is allowable

only where the reviewing court is left with a "firm conviction" that error has been committed. *Van Tran,* 212 F.3d at 1153-54.

2. Due-Process Claim.

Petitioner's first argument is that CALJIC 2.50.02 deprived him of due process because it relieved the state of its burden of proving him guilty beyond a reasonable doubt and provided the jury with a "shortcut" to a guilty verdict. The challenged instruction is repeated below (emphasis added):

> Evidence has been introduced – in again, this New York incident – for the purpose of showing the defendant engaged in an offense involving domestic violence on one occasion other than that charged in the case. . . . If you find that the defendant committed a prior offense involving domestic violence, you may, but you are not required to, infer that a defendant had a disposition to commit the same or similar offense. If you find that the defendant had this disposition, you may, but you are not required to, infer that he was likely to commit *and did commit* the crime with which he is accused.

Other jury instructions provided that the August 1993 (not the November 1994) incident of violence could be considered proved if the government demonstrated, by a preponderance of the evidence, that it had occurred. Petitioner argues that the version of CALJIC 2.50.02 used in his trial thus allowed the jury to find him guilty based on nothing more than a preponderance of the evidence showing commission of an *uncharged past act,* evidence

patently insufficient to find him guilty beyond a reasonable doubt of the actual crimes charged. The California court of appeal rejected this argument, finding that there was no reasonable likelihood that jurors would interpret the instruction, *when taken together with all other instructions,* as allowing them to find petitioner guilty based only on proof of the August 1993 incident.

* * *

The challenged instruction was modeled after the 1997 version of CALJIC 2.50.02. An amendment added in 1999 attached the caveat, "[h]owever, if you find [by a preponderance of the evidence] that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove [beyond a reasonable doubt] that [he][she] committed the charged offense[s]. The weight and significance, if any, are for you to decide." Due-process challenges to the pre-1999 instruction (and a similar instruction, CALJIC 2.50.01, given in cases where sexual abuse was charged) have split the California courts. Some have held that the instructions violate due process, even when coupled with correct reasonable-doubt instructions. *See People v. Frazier,* 89 Cal. App. 4th 30, 40 (2001); *People v. Younger,* 84 Cal. App. 4th 1360, 1381-82 (2000); *People v. Orellano,* 79 Cal. App. 4th 179, 186 (2000); *People v. Vichroy,* 76 Cal. App. 4th 92, 99 (1999).

Other decisions have held that any flaw in the instruction was cured by other, correct instructions, or rendered harmless by overwhelming evidence of guilt. *See People v. Jeffries,* 83 Cal. App. 4th 15, 22-24 (2000) (no error, taking instructions as a whole); *People v. Escobar,* 82 Cal. App. 4th 1085, 1098 (2000) (same); *People v. James,* 81 Cal. App. 4th 1343, 1355 (2000) (error harmless); *People*

v. Waples, 79 Cal. App. 4th 1389, 1396-98 (2000) (no error, taking instructions as a whole); *People v. O'Neal,* 78 Cal. App. 4th 1065, 1078-79 (2000) (same); *People v. Regalado,* 78 Cal. App. 4th 1056, 1063-64 (2000) (same); *People v. Van Winkle,* 75 Cal. App. 4th 133, 147-49 (1999) (same). The Court is aware of no other opinion considering CALJIC 2.50.02 (or CALJIC 2.50.01) in the context of a federal habeas petition.

* * *

Former CALJIC 2.50.02 allowed a jury to draw two permissive inferences. Permissive inferences are generally acceptable unless "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Ulster County Court v. Allen,* 442 U.S. 140, 157 (1979). *See also United States v. Warren,* 25 F.3d 890, 897 (9th Cir. 1994). "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Francis v. Franklin,* 471 U.S. 307, 316 (1985). In the usual case, a court determines the constitutionality of a permissive-inference instruction on a case-by-case basis, to determine whether it can be said "with substantial assurance" the ultimate fact to be inferred was "more likely than not to flow from" the particular facts that had actually been proved in a particular case. *See Ulster County Court,* 442 U.S. at 162-67; *Leary v. United States,* 395 U.S. 6, 36 (1969). *See also Warren,* 25 F.3d at 898; *Van Winkle,* 75 Cal. App. 4th at 143 (rejecting an attack upon CALJIC 2.50.01 that made an "irrationality" argument). Here, however, petitioner has pursued and now presents a similar but subtly different claim, one founded on the well-settled principle that a permissive inference cannot under

any circumstances "undermine the factfinder's responsibility at trial, based on evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt." *Ulster County,* 442 U.S. at 156. *See also In re Winship,* 397 U.S. 358, 364 (1970).[4] Petitioner argues that CALJIC 2.50.02 plainly does exactly that, allowing the jury to disregard other constitutionally relevant evidence and to convict on an insufficient basis, nowhere near proof beyond a reasonable doubt of all elements of the charged offenses.

To understand and evaluate this argument, one must first note the issues that were and were not in dispute at petitioner's trial. As petitioner acknowledges, whether he had stabbed Stellwagen was never in dispute. Rather, "the only issue that mattered" (Trav. 7) and the "sole issue at trial" (Pet. 29) was petitioner's mental state at the time of the stabbing. This one issue bore on the two most serious charges: attempted murder and aggravated mayhem. Both of these are specific-intent crimes. All of the other charges were for general-intent crimes. Attempted murder, as the jury was instructed, requires an intent to kill. Aggravated mayhem, as the jury was told, requires an intent to permanently disfigure or disable, as well as an intent to vex, annoy, or injure the victim. The crux of petitioner's defense was that he did not form the requisite intent for the crimes of attempted murder and aggravated mayhem; rather, his thinking was impaired by a bipolar disorder.

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[4] Petitioner, whose petition is governed by AEDPA, is *not* attacking CALJIC 2.50.02 on the basis that it allows other-crimes evidence for the purpose of showing conformity therewith. *Cf. Garceau v. Woodford,* 275 F.3d 769, 774 (9th Cir. 2001) (noting that the Supreme Court has never ruled on the constitutionality of this practice).

The vast majority of petitioner's defense, and all of the prosecution's rebuttal, was devoted to expert testimony regarding petitioner's mental condition.

The defense presented two experts, Watson and Dr. Woods, who testified that petitioner suffered from a bipolar disorder and that this disorder impaired his thinking at the time of the stabbing. Petitioner's father and grandmother also testified as to petitioner's mental troubles. Petitioner's argument now is that the challenged jury instruction undermined the government's burden of proof and allowed the jury to disregard all of the evidence put on by petitioner going to his mental state at the time of the stabbing. *Cf. Calderon v. Coleman,* 525 U.S. 141, 146 (1998) (test for constitutional error in death-penalty sentencing cases is whether challenged instruction was applied by jury in a way that prevented consideration of constitutionally relevant evidence).

To identify constitutional error in a jury instruction warranting habeas relief, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some [constitutional] right." *Cupp v. Naughten,* 414 U.S. 141, 146 (1973). The first task is to examine the instruction itself for error. *Francis,* 471 U.S. at 315. Even if the instruction appears flawed when taken in isolation, before constitutional error can be found the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language. *Ibid.* If the other instructions explain the infirm portion of the charge such that there is no "reasonable likelihood" that the jury understood themselves as authorized to take an unconstitutional shortcut, there is no error of constitutional dimensions. *Estelle v. McGuire,*

502 U.S. 62, 72 (1992). Conversely, if from the instructions as a whole there was a reasonable likelihood that the jury was misled, habeas relief must result unless the error was harmless. *Cf. Boyde v. California,* 494 U.S. 370, 380 (1990) (habeas relief must issue where jury is "clearly instructed by the court that it may convict a defendant on a legally impermissible theory," unless error was harmless beyond a reasonable doubt).

Read in isolation, the presumption in this case flunks the test for permissive inferences. The inference in CALJIC 2.50.02, on its face, focuses the jury's attention solely on past acts (and a propensity inference derived therefrom) as a basis for a conviction. It does not adequately indicate, again taken alone, that such evidence is not enough for a finding of guilty beyond a reasonable doubt. In emphasizing past acts, it marginalizes evidence with much more bearing on the present case. The inference, though permissive, undermines the state's burden of proving guilt beyond a reasonable doubt, and threatens to preclude consideration of relevant evidence.

The analysis thus proceeds to how the instruction was reasonably perceived when taken in the context of the entire charge, as the jury was told to consider the instructions. The rest of the charge may have cured the error. Specifically, to remedy the error the other parts of the charge must have constructively supplied the message added to the instruction in 1999 – that past-act evidence alone, though admissible, was not enough to prove guilt beyond a reasonable doubt – while also properly defining the reasonable-doubt standard and directing the jury that it could not employ the former CALJIC 2.50.02 to preclude consideration of relevant evidence.

Fortunately for respondents, specific instructions were given that made the former CALJIC 2.50.02's limits clear. Given that specific intent was in petitioner's words "the only issue that mattered," the analysis must focus on instructions pertaining to this issue. Clear and unambiguous instructions were given on the subject. Most importantly, near the outset of the instructions – not long after being told that they had to consider all of the instructions together, and very shortly before being given CALJIC 2.50.02 – the jury was directed with an instruction modeled after CALJIC 2.02 that provided as follows (RT 1588-89) (emphasis added):

> Now, the specific intent with which an act is done may be shown by the circumstances surrounding the commission of that act. *However, you may not find this defendant guilty of the crimes charged in Counts One and Three, namely, the crime of attempted murder in Count One, and aggravated mayhem in Count Three, unless the proved circumstances are not only, Number One, consistent with the theory that the defendant had that specific intent for those crimes, but, Number Two, cannot be reconciled with any other rational conclusion.*
>
> *Also, if the evidence as to any specific intent for those two charges permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state for those two crimes, and one of which points to its absence, you must adopt that interpretation which points to its absence.* If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you

> must accept the reasonable interpretation and reject the unreasonable one.

This instruction was crucial. Given right before the erroneous presumption, it told the jury that acquittal was *required* on Counts One and Three unless the "*proved* circumstances" concerning the charged act were such that acquittal could not "be reconciled with any . . . rational conclusion." It also reaffirmed that specific intent was a key issue, and that if there were two reasonable interpretations of the evidence going to specific intent – several days' worth of evidence, as the jury would soon be reminded by both the prosecutor and defense counsel – the jury *had* to return a not-guilty verdict on Counts One and Three. This instruction used language of command, not option. The directive language made it evident that this instruction carried more weight than the permissive inference. It also steered the jury away from improperly "harmonizing" the permissive inference with the beyond-a-reasonable-doubt standard given elsewhere in the instructions by concluding that one way for the government to meet its burden was simply to prove the August 1993 incident by a preponderance. *See Francis,* 471 U.S. at 322. Juries are presumed to follow their instructions. *Weeks v. Angelone,* 528 U.S. 225, 234 (2000). For a jury to have convicted on Counts One and Three on the basis of a *permissive* presumption when they were *directed,* independent and apart from the reasonable-doubt instruction, to acquit unless (1) the *proved* circumstances *surrounding the commission of the charged act* precluded *"any rational conclusion"* indicating an absence of specific intent *and* (2) the evidence could not be reasonably interpreted as pointing to an absence of specific intent, they would have had to ignore the clear letter of this instruction.

Although this instruction was vital, other portions of the charge made it even less likely that the former CALJIC 2.50.02 would be construed to allow for a verdict based only on past acts. In close proximity to CALJIC 2.50.02, in connection with the associated "preponderance" instruction, the jury was told, "[y]ou should consider all of the evidence bearing upon every issue regardless of who produced it" (RT 1594).[5] The judge then told the jury several times that the state had the burden of proving petitioner guilty beyond a reasonable doubt, and defined reasonable doubt as follows (RT 1597-98) (emphasis added):

> It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, *after the entire comparison and consideration of all the evidence,* leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

This instruction both reaffirmed the government's burden and reminded jurors once again that their verdict had to rest upon consideration of all the evidence in the case, not just the August 1993 incident. Then, the judge focused once more on the government's burden to prove

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[5] The jury was also given a similar admonition ("You should carefully review all of the evidence upon which proof of [a fact] depends") as part of CALJIC 2.27, given immediately before the instructions going to the 1993 incident (RT 1592). Thus, discussion of the incident was narrowly bookended with reminders that it must consider all of the evidence.

specific intent beyond a reasonable doubt (RT 1599) (emphasis added):

> Now, the crime of attempted murder requires the specific intent to kill.
>
> The crime of aggravated mayhem requires the specific intent to disfigure permanently.
>
> In the crime charged in Count One, attempted murder, there must exist a *union or joint operation of act or conduct and a certain mental state also in the mind of the perpetrator. Unless this mental state exists, the crime to which it relates is not committed.*
>
> Now, the mental state required for the crime of attempted murder as alleged in Count One of the information is express malice, and that element is defined in these instructions dealing with that Count.
>
> *Now, you have received evidence regarding a mental disease or disorder of the defendant at the time of the commission of the crime charged in Count One, attempted murder, and Count Three, aggravated mayhem, and the lesser offenses of Count One, which would be attempted voluntary manslaughter.*
>
> *You can consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent or mental states required for those particular offenses and enumerated in the instructions for those crimes. These mental states are elements of those particular offenses which the prosecution must prove beyond a reasonable doubt.*

This instruction yet again reminded the jury of the importance of proving specific intent beyond a reasonable doubt, and that they were to take petitioner's evidence going to mental disease or disorder into account when making this determination. After giving this instruction, the Court advised the jury as to the elements of the charges, including the specific-intent requirements applicable to Counts One and Three.

These instructions came at the close of a trial where petitioner's mental state at the time of the stabbing was the central issue. They made the importance of this issue, and the government's burden on it, clear. The closing statements of both the prosecutor and defense counsel – though not to be given as much weight as the instructions themselves, *see Boyde,* 494 U.S. at 384-85 – were of the same effect and in no way eroded the instructions' clear purport. Both sides emphasized a beyond-a-reasonable-doubt standard of proof. Neither said that a guilty verdict could rest solely on proof of the 1993 episode. When the prosecutor did mention the 1993 incident, saying it was "very, very important," it was not because the incident could prove the 1994 crimes, but rather because it showed motive (RT 1692) (emphasis added):

> And the August '93 incident is very, very important, because it shows motive. And as I said before, the motive in this case is significant in terms of willful deliberation and premeditation. *He wasn't premeditating this murder since August of '93, but when he found out in 1994 that she was seeing another man, he started thinking about it.* And he told her to beware of the backlash, and he was jealous, and he didn't want her to wear the ring on November 17th, and on

> November 17th, he didn't want her to go out with another man. And he's contemplating it.
>
> And, again, I can't tell you word for word what he was thinking, from 8:00 in the evening until 2:00 in the morning, when she comes home. But he lets her know. He lets her know. "I want to kill you." He's turning it over in his head. He's thinking about it. He's weighing the consequences of it . . .

Finally, the overwhelming majority of the evidence presented in the nine-day trial went to the facts of the November 1994 incident and, especially, petitioner's mental condition at that time. Indeed, petitioner describes his mental state as the "sole issue at trial" (Pet.29). Four experts spent several days testifying as to their diagnoses. Under petitioner's theory of the jury's more than four hours of deliberations, all of that evidence was irrelevant. All the prosecution needed was to present the facts of the 1993 incident, evidence that occupied only a few minutes of a nine-day trial. However, a "commonsense understanding of the instructions in light of all that ha[d] taken place at trial" would have directed the jurors' attention to the several days of potentially exculpatory evidence in their deliberations. *Boyde,* 494 U.S. at 380-81.

In light of the above, there was no reasonable likelihood that petitioner's jury construed the former CALJIC 2.50.02 as allowing them to short-circuit the other, proper instructions going to consideration of all the evidence and the government's burden of proof. Certainly, the court of appeal did not clearly err in holding as much. Although the Court has no doubt that such a scenario (on a different record) could exist, this is not a situation where the jury would have believed that the inference was a sufficient

basis for a guilty verdict, or that it authorized preclusion of constitutionally relevant evidence.

- This case highlights even more than most why "inference instructions in general are a bad idea." *Warren,* 25 F.3d at 900 (Rymer, J., concurring). Without the key instructions discussed above to cure the defect, the outcome might be different. But these instructions were given, making this a case that does not warrant habeas relief.

* * *

The foregoing is sufficient to show that the court of appeal did not err in finding there was no reasonable likelihood that the jury construed CALJIC 2.50.02 as allowing them to convict petitioner based solely on proof of the August 1993 incident. The jury's responses to the verdict form also point toward the conclusion that CALJIC 2.50.02 did not produce an unconstitutional directive, or, in the alternative, that any error was harmless under *Brecht v. Abrahamson,* 507 U.S. 619, 637-38 (1993). Section 664(a) of the California Penal Code provides a "penalty provision" if a crime of attempt is committed "willfully, deliberately and with premeditation." *People v. Bright,* 12 Cal.4th 652, 668 (1996). This provision was charged in Count One of the information, the attempted-murder count (CT 001). Although central to the crime of attempted murder with which petitioner was charged, in his instructions the judge told the jury that it had to make a special and separate finding as to whether the allegation applied (RT 1602). The jury was specifically instructed that the government bore the burden of proving the allegation true beyond a reasonable doubt (RT 1603). The written copy of the instructions that was given to the jury

separated the instruction for attempted murder from the instruction pertaining to the "willful, deliberate and premeditated" allegation (CT 169-170). A separate blank on the verdict form, in addition to the space provided for the verdict of "guilty" or "not guilty" on the charge of attempted murder, was provided for the jury's response to the allegation (CT 198-99).

The jury made a separate finding that the "willful, deliberate and premeditated" allegation applied (*ibid.*). In light of the instructions given, the jury's finding suggests that it resolved the "only issue at trial" – whether petitioner had been proven beyond a reasonable doubt to have formed the specific intent to kill (or maim) – in the state's favor. Petitioner argues that the jury's finding with regard to this allegation may have been motivated only by proof of the August 1993 incident. He quotes from the prosecutor's closing argument (emphasis added):

> And the August '93 incident is very, very important, because it shows motive. And as I said before, the motive in this case is significant in terms of *willful deliberation and premeditation.*

However, petitioner does not mention what the prosecutor said next:

> *He wasn't premeditating this murder since August of '93, but when he found out in 1994 that she was seeing another man, he started thinking about it.* And he told her to beware of the backlash, and he was jealous, and he didn't want her to wear the ring on November 17th, and on November 17th, he didn't want her to go out with another man. And he's contemplating it.

The prosecutor clearly indicated to the jury that the 1993 incident was *not* the basis for proving the "premeditation" allegation. Rather, any premeditation occurred in the days before the November 1994 stabbing.

* * *

Given the above, it is unnecessary to delve further into whether the instruction had a "substantial and injurious effect or influence on the jury's verdict." *Brecht,* 507 U.S. at 638. Petitioner's first claim of error is **DENIED**.

3. Ex Post Facto Claim.

Petitioner's second claim invokes the Ex Post Facto Clause. Petitioner asserts that California Evidence Code Section 1109 (which, as enacted in 1996, allows past acts of domestic violence to be admitted into evidence subject to the court's power to exclude them if they create undue prejudice, confuse the issues, mislead the jury or waste time), applied *in conjunction with* CALJIC 2.50.02, violated the Ex Post Facto Clause as to him because it allowed the jury to convict him based on a lower quantum of evidence than was required in 1994, when he committed the crimes.[6]

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[6] In its brief, the state made a conclusory argument that this claim was procedurally barred. The argument has some appeal in light of recent developments in California law and the history of petitioner's case. The state, however, has failed to meet its burden of proving "adequacy" under *Bennett v. Mueller,* 273 F.3d 895, 901 (9th Cir. 2001), *i.e.,* of showing that the *particular* procedural bar at issue here – the "*Dixon* rule," after *In re Dixon,* 41 Cal.3d 756 (1953) – was consistently

(Continued on following page)

Petitioner stabbed Stellwagen in November 1994, roughly two years before both the enactment of California Evidence Code 1109, which permitted the introduction of past-act evidence of domestic violence in trials involving of [sic] domestic abuse, and the promulgation of the version of CALJIC 2.50.02 used at his trial. Petitioner frames the constitutional issue presented as "whether the impact of a statute that permits use of a form of evidence not admissible at the time of the commission of a charged offense, when combined with a new instruction deeming that form of evidence as sufficient to support a conviction, violates the ex post facto clause" (Pet. 30).

A law has an impermissible ex post facto effect if it alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *Carmell v. Texas,* 529 U.S. 513, 530 (2000). Since Evidence Code Section 1109 does not, by itself, make any provision as to the quanta of evidence necessary to convict an offender, petitioner does not attack it directly. Rather, he says that the statute has an unconstitutional effect when coupled with the former CALJIC 2.50.02, which did allow a jury to convict based on past acts made admissible by Section 1109.

Since this claim was not adjudicated on the merits in state court, a lessened level of deference applies in habeas review. As discussed in the context of petitioner's due-process argument, however, there is no reasonable

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applied in the relevant time period. Therefore, the asserted bar will not prevent consideration of plaintiff's ex post facto claim.

likelihood that the jury interpreted the instructions as allowing them to convict petitioner based solely on the August 1993 incident. Since CALJIC 2.50.02 did not act to alter the quantum of proof necessary to obtain a conviction in this case, the Ex Post Facto Clause was not offended. *See Thompson v. Missouri,* 171 U.S. 380, 387 (1898).

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is **DENIED**. Judgment will be entered on behalf of respondents. The clerk shall close the file.

IT IS SO ORDERED.

Dated: April 21, 2002.

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL STERLING,

Plaintiff,

v.

ERNIE ROE, Warden, et al.,

Defendant. /

Case Number: C01-03809 WHA (PR)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 22, 2002 I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Christopher W. Grove
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102

Dennis P. Riordan
Donald M. Horgan
Dylan L. Schaeffer
523 Octavia Street
San Francisco, CA 94102

Dated: April 22, 2002

Richard W. Wieking, Clerk

By: /s/ [Illegible]
Deputy Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DANIEL STERLING, Defendant and Appellant.	A081873 (San Francisco County Super. Ct. No. 167656) (Filed Nov. 15, 1999)

Defendant and appellant Daniel H. Sterling (appellant) was charged with attempted premeditated murder (Pen.Code, §§ 187, 664), mayhem (*id.*, § 203), aggravated mayhem (*id.*, § 205), assault by means of force likely to produce great bodily injury (*id.*, § 245, subd. (a)(1)), intentional corporal injury of a cohabitant (*id.*, § 273.5, subd. (a)), and battery resulting in serious bodily injury (*id.*, § 243, subd. (d)). The information also alleged enhancements to various counts for use of a deadly weapon (*id.*, § 12022, subd. (b)) and great bodily injury (*id.*, § 12022.7, subd. (d)).

A jury found appellant guilty of the charged offenses with enhancements. The trial court sentenced him to state prison for a term of life with the possibility of parole plus four years.

Appellant raises several contentions regarding Evidence Code section 1109,[1] which authorizes the use of evidence of past domestic violence to prove the disposition to commit the charged acts of domestic violence. Appellant also contends that certain rebuttal testimony of Dr. Ronald H. Roberts was improperly admitted. We affirm.

I. Summary of Facts

The victim, Lisa Stellwagen Wiles (Stellwagen),[2] was in a romantic relationship with appellant for seven year commencing in high school in Canadaigua, New York and ending when the offenses were committed in San Francisco on November 18, 1994. They traveled frequently during the relationship, but usually resided in either Canadaigua or San Francisco. Appellant was interested in occult matters.

In August 1993, appellant grabbed Stellwagon by the neck, threw her against a wall, and threatened to kill her because he believed she was seeing another man. Stellwagen and appellant might have been under the influence of "LSD" at the time of the incident.

On November 14 or 15, 1994, after Stellwagen and appellant discussed having an "open relationship," he

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[1] Unless otherwise stated, all further citations to a statute are to the Evidence Code.

[2] By the time of the trial, the victim had married a Mr. Wiles. Consistent with the parties we will refer to her by her maiden name of Lisa Stellwagen.

went to Mount Diablo by himself and she began a relationship with Jeremy Wiles. On November 15, 1994, appellant telephoned Stellwagen. She stated that she had met someone else and did not want any further contact with him. Appellant responded: "You'll get what's coming to you, be prepared for the backlash."

On November 16, 1994, appellant returned to the apartment he shared with Stellwagen. Immediately he noticed that she was wearing a new ring. When Stellwagen stated that the ring was from her new boyfriend, appellant told her to take it off because it was bad. Appellant also tried to obtain information from Stellwagen about the new boyfriend, such as where he lived and what he looked like. Stellwagen continued to wear the ring and did not disclose any information.

On November 17, 1994, appellant remained at the apartment with Stellwagen and the relationship was friendly. At 4:00 p.m. they were at the motion picture "Interview With a Vampire." Appellant "liked it a lot." Upon returning to the apartment at between 7:00 and 8:00 p.m., Stellwagen made arrangements over the telephone to meet her new boyfriend. Appellant heard the telephone call and attempted to convince her to stay with him.

When Stellwagen returned at 2:00 a.m. on November 18, 1994, appellant was irritated and angry. During a lengthy conversation, appellant stated that he wanted to kill Stellwagen and drink her blood. Appellant also stated that he loved Stellwagen and would not hurt her. Between 6:00 and 8:00 a.m., Stellwagen fell asleep; appellant was next to her on the bed.

Between 3:00 and 4:00 p.m. on November 18, 1994, Stellwagen awoke. Appellant left the bed and returned

carrying a knife. As he approached the bed, appellant stated that he was going to kill Stellwagen; she would die that night.

Appellant "straddled" Stellwagen on the bed. He stabbed her in the back five times while she struggled and screamed. After Stellwagen ceased struggling and lay down, appellant stabbed her one time in the arm, two times in the chest, and one time in the neck. He licked the blood from a chest wound. When someone knocked on the door, appellant put his hand over Stellwagen's mouth. Appellant prevented Stellwagen from removing the knife from her chest but relented when she declared how much it hurt.

While Stellwagen lay in pain and bleeding, appellant questioned her about how it felt to die and what would happen to him. Eventually appellant agreed to call an ambulance if Stellwagen would report that she was stabbed by a black man. Stellwagen agreed and the emergency "911" number was called.

Stellwagen believed that appellant stabbed her out of jealousy because she formed a relationship with another man. During the attack, appellant declared that he knew she did not love him anymore. Appellant also stated that he was stabbing Stellwagen because he loved her.

The defense centered on appellant's mental condition. Members of his family testified to a family history of mental problems, suicide, and substance abuse. Clinical psychologist Dale G. Watson testified that appellant had "bipolar or manic-depressive illness" with "psychotic features." Forensic psychiatrist George Woods testified that appellant "was suffering and continues to suffer from a bipolar disorder, a manic depressive disorder." It was Dr.

Woods' belief that on the day of the offenses, appellant acted with "impaired thinking" from the "psychosis of the bipolar disorder."

In rebuttal the prosecution presented expert witnesses. Forensic psychiatrist David R. Kessler diagnosed appellant's condition on the day of the offenses as "poly substance abuse and possibly mixed personality disorder." Dr. Kessler further testified that appellant was not bipolar or manic. Psychologist Ronald H. Roberts gave the diagnosis of "personality disorder not otherwise specified. . . . [H]e has prominent aspects of both a narcissistic personality disorder and of a schizotypal personality disorder. There are antisocial trends, as well." These disorders were "lifelong" and were present at the time of the stabbing. Appellant was not psychotic.

II. Section 1109

Section 1109, subdivision (a) provides: "Except as provided in subdivision (e), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Section 1109, subdivision (e) provides: "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." Section 1108 applies the identical rule to sexual offenses, without the 10 year limitation.

The Legislature determined that persons who commit sexual offenses or acts of domestic violence are very likely to repeat their actions. In enacting sections 1108 and 1109

the intention of the Legislature was to allow evidence of past sexual offenses or acts of domestic violence to be used by a jury to prove that the defendant committed the charged offense of the same type. (*People v. Soto* (1998) 64 Cal.App.4th 966, 982, Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1876 (1995-1996 Reg. Sess.) (Jun. 25, 1996) pp. 3-4.)

Appellant challenges the constitutionality and application of section 1109. We will follow the pattern of the briefs and treat each challenge under the appropriate subheading.

A. Due Process

Appellant contends that section 1109 "violates constitutional due process on its face." This contention lacks merit.

The California Supreme Court recently considered a due process challenge to section 1108, a provision similar to section 1109 in that it permits the admission of a defendant's other sex crimes for the purpose of showing a propensity to commit those crimes. Relying on *People v. Fitch* (1997) 55 Cal.App.4th 172, 177-184, which upheld section 1108 against a due process challenge, the court concluded that "the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. As stated in *Fitch*, '[S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . section 352. (§ 1108, subd. (a).) By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352,

the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (§ 352.)'" (See *People v. Falsetta* (1999) ___ Cal.4th ___ 1999 Daily Journal D.A.R. 11175, 11178.)

Admission of propensity evidence under section 1109 is similarly subject to the limitations of section 352. (§ 1109, subd. (a).) As with section 1108, this safeguard ensures that section 1109 does not violate the due process clause. (See *People v. Falsetta, supra,* ___ Cal.4th at pp. ___ 1999 Daily Journal D.A.R. at pp. 11178-11179.) Accordingly, we hold that section 1109 does not violate the due process clause of the federal or California Constitutions on its face.

B. Instruction

Appellant contends that the requirement in CALJIC No. 2.50.01 that the prior offense of domestic violence be proven by a preponderance of the evidence permitted the jury to find appellant guilty without finding beyond a reasonable doubt that he committed the charged offenses.

The challenged instructions state: "Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one occasion other than that charged in the case.

"....

"If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to

commit the same or similar offense. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused."

"Within the meaning of the preceding instruction, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed a crime other than those for which he is on trial.

"You must not consider this evidence for any other purpose unless you find by a preponderance of the evidence that a defendant committed the other crime."

A number of recent appellate court cases have grappled with the question raised by appellant. The issue is currently before our Supreme Court. (*People v. Watts* (1998) 66 Cal.App.4th 399, review granted Dec. 2, 1998 (S073741); *People v. Hoover* (1998) 64 Cal.App.4th 1422, review granted Sept. 23, 1998 (S072374); *People v. Baker* (1998) 65 Cal.App.4th 1452, review granted Nov. 24, 1998 (S073543); *People v. Ritson* (1998) 63 Cal.App.4th 1276, review granted Aug. 12, 1998 (S071280); *People v. Tufunga* (1998) 65 Cal.App.4th 287, review granted Sept. 16, 1998 (S072486); *People v. Acosta* (1999) 71 Cal.App.4th 1206, review granted Aug. 18, 1999 (S079731).) In virtually all cases there has been a grant of petition for review by the Supreme Court or a depublication.[3]

In a line of cases beginning with *People v. McClellan* (1969) 71 Cal.2d 793 and reaffirmed in *People v. Carpenter*

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[3] *People v. Guzman* (1999) 73 Cal.App.4th 103, depub.; *People v. Bersamina* (1999) 73 Cal.App.4th 103, depub.

(1997) 15 Cal.4th 312, 381, the Supreme Court has held that the burden of proof necessary for a jury to rely on evidence of other crimes admitted under Evidence Code section 1101, subdivision (b) is the standard of preponderance of the evidence.

In *People v. Carpenter, supra*, 14 Cal.4th at p. 312, the "Trailside Killer" was found guilty of murdering seven hikers, some of whom he also raped. (*Id.* at p. 344.) On appeal he challenged the use of prior crimes evidence and argued that the prior crimes must be established by clear and convincing evidence. The Supreme Court held that prior crimes need only be established by a preponderance of the evidence. The defendant also argued that the jury instructions permitting the jury to consider prior crimes proved by a preponderance of the evidence reduced the prosecution's burden of proof as to the defendant's intent. But the court held that the standard instructions on reasonable doubt and on the sufficiency of circumstantial evidence for proving specific intent were clear that the prosecution had to prove intent beyond a reasonable doubt. (*Id.* at p. 383.)

The Supreme Court upheld the use of prior crime evidence in *People v. Lisenba* (1939) 14 Cal.2d 403, 429-430. The defendant was charged with murdering his wife and the trial court admitted evidence that the defendant had also murdered his former wife under circumstances similar to the current crime. (*Id.* at p. 427.) The purpose for which the evidence was admitted was to prove intent. The court approved of a lower burden of proof to establish prior crimes, even though the jury was allowed to infer from that evidence the existence of an elemental fact, namely intent. "'"It is only the ultimate material facts to which the rule of reasonable doubt applies. The facts

regarding the other transactions were simply evidentiary facts introduced for the purpose of being considered, together with all of the other evidence in the case, upon the question of criminal knowledge and intent; and though the jury may have entertained some reasonable doubt as to some of the other transactions, or some of the other items of evidence, which tend to prove guilty knowledge or intent, if, notwithstanding that fact, and having considered the evidentiary facts, doubtful and otherwise, they were convinced beyond a reasonable doubt of the ultimate fact of guilty knowledge and intent, it is sufficient."'" (*Id.* at p. 430.)

In *People v. Medina* (1995) 11 Cal.4th 694, the Supreme Court held that during the guilt phase of a criminal trial, other crimes may be proved by a preponderance of the evidence. (*Id.* at p. 764.) "Prior cases explain that the facts tending to prove the defendant's other crimes for purposes of establishing his criminal knowledge or intent are deemed mere 'evidentiary facts' that need not be proved beyond a reasonable doubt as long as the jury is convinced, beyond such doubt, of the truth of the 'ultimate fact' of the defendant's knowledge or intent. [Citation]" (*Id.* at p. 763.)

The reasoning of *Carpenter, Lisenba*, and *Medina* was applied to section 1108 in *People v. Van Winkle* (1999) 75 Cal.App.4th 133. There the court held ". . . that prior sexual offenses, proved by a preponderance of the evidence may be used to infer that the defendant committed the current sexual offense, so long as the current offense is proved beyond a reasonable doubt. While ultimate/elemental facts (the current offense) must be proved beyond a reasonable doubt because they *necessarily* prove the elements of the crime, basic/evidentiary facts (such as

prior offenses) may be proved by a preponderance of the evidence." (*Id.* pp. 146-147.)

Similarly here, prior offenses of domestic violence are merely "evidentiary facts" that may be proven by a preponderance of the evidence. As noted in *Lisenba, supra,* 14 Cal.2d at p. 429 and *Van Winkle, supra*, 75 Cal.App.4th at p. 146, the prior offenses are "collateral circumstances" that are used to infer an element of the charged crime. The lower burden of proof is not being used to determine the "ultimate material facts" of the offense. (*Lisenba, supra*, at p. 430; *Van Winkle, supra*, at p. 146.) Accordingly, prior offenses of domestic violence (proved by a preponderance of the evidence) may be used to infer that the defendant committed the current charge of domestic violence, as long as the current offense is proved beyond a reasonable doubt.

We do not accept appellant's contention that the trial court's instructions were confusing and allowed the jury to convict him of the current offense based on a prior offense of domestic violence proved by a preponderance of the evidence. Appellant must establish a reasonable likelihood that the jury misunderstood the instructions as a whole. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) The instructions did not provide that the current crime may be proved by a preponderance of the evidence. Instead, they expressly provided that only the prior offense must be proved by a preponderance of the evidence. If the jury found by a preponderance of the evidence that appellant committed the other offense of domestic violence, then the jury was allowed, but not required, to infer another evidentiary fact: that appellant had a disposition to commit the same or similar type offense. If the jury made the first inference then the jury was allowed, but was not required, to infer

that appellant was likely to commit and did commit the current act of domestic violence.

We further note, as did the court in *People v. Van Winkle, supra*, 75 Cal.App.4th at pp. 148-149, that CALJIC 2.01 relating to circumstantial evidence was not requested or given to the jury. It was the giving of this instruction that apparently led the court in *People v. Bersamina* (1999) 73 Cal.App.4th 930 and *People v. Guzman* (1999) 73 Cal.App.4th 103 to conclude that this instruction would have confused the jury and allowed a conviction based on a preponderance of the evidence. But in the case at bar, based on the jury instructions as a whole, the prosecution had the burden of proving every element beyond a reasonable doubt and the jury could not convict appellant solely on proof of the other crimes.

Nor could the argument of counsel lead to a misunderstanding of the burden of proof to find the ultimate facts beyond a reasonable doubt.

The prosecutor repeated throughout her opening argument and closing argument that the standard of proof for each of the charges was beyond a reasonable doubt. Preponderance of the evidence was never mentioned.

References to the prior instance of domestic violence by the prosecutor were as follows:

"The fact that he was in a relationship with her for seven years, the fact that this relationship involved violence in August of 1993 . . . that proves motive, and in this case, it proves premeditation and deliberation on his attempted murder."

"And what we've learned, among all else in this case, is that domestic violence happens more than once. . . ."

"Now the August '93 incident, I'm not suggesting that in the August '93 incident, the defendant, at that time, was planning to kill Lisa Stellwagen. What I'm suggesting is that in '93, he was also jealous of her. . . . [¶] And the real significance of the defendant shoving her up against a wall and choking her and threatening to kill her is the fact that he gets jealous. He wants to do what he wants to do when he wants to do it, but when she does something, in terms of another man or a relationship, he gets jealous. [¶] And the August '93 incident is very, very important, because it shows motive. And as I said before, the motive in this case is significant in terms of willful deliberation and premeditation. He wasn't premeditating this murder since August of '93, but when he found out in 1994 that she was seeing another man, he started thinking about it."

Defense counsel also repeatedly mentioned the reasonable doubt burden of proof, including: "But what I'm going to – what I want to emphasize is that instruction that the judge read to you at the beginning of the case, which the prosecutor read to you in her opening remarks to you, and that is, the presumption of innocence and the burden of proof. And we all mention it because it is so important. And it is so important that I'm going to read it to you again. And that is, the definition of reasonable doubt."

The reference by the defense to the prior instance of domestic violence was: "Now, there was the incident of [August] of 1993. And as the judge indicated, you can consider that evidence, if you want, if it goes to motive to show intent to kill, an actual motive and actual intent to kill. [¶] And what I'm suggesting to you is that this incident in August of 1993, all the facts, do you really have all the facts about them or not? She's got to prove that that

happened beyond a preponderance of the evidence to you – [¶] [Prosecutor]: I'm sorry, your honor. I object to that, 'beyond a preponderance of the evidence.' [¶] The court: 'By a preponderance of the evidence.' [¶] [Defense counsel]: – By a preponderance of the evidence to you that the '93 incident somehow took place."

We conclude that the consistent message from the instructions as whole, and from the argument of both sides, was that the jury must find appellant guilty beyond a reasonable doubt before they could convict him of any of the charged or lesser included offenses. The proper reasonable doubt standard was emphasized many times in the instructions and arguments. Neither counsel even hinted that guilt might be based on proof by a preponderance of the evidence. Accordingly, on the instant record, no reasonable likelihood exists that the jury believed it could convict appellant on a lower standard.

C. Section 352

Appellant contends: "[T]he trial court abused its discretion in admitting the evidence under . . . section 352." This contention lacks merit.

"Under . . . section 352, the trial court has discretion to exclude evidence '. . . if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Yovanov, supra*, 69 Cal.App.4th at p. 406.)

Factors that must be evaluated to determine whether the trial court abused its discretion in admitting the

evidence are the inflammatory nature of the evidence, probability of confusion remoteness, consumption of time, and probative value. (*People v. Harris, supra*, 60 Cal.App.4th at pp. 737-739.)

Section 1109 was "'a sea change'" in the law governing the admission of evidence of past offenses in domestic violence cases. (See *People v. Soto, supra*, 64 Cal.App.4th at p. 988.) Therefore, cases which limited the introduction of evidence of past offenses on the grounds that such evidence was highly inflammatory or lacked probative value are no longer persuasive. (*Id.* at p. 991.)

In the present case, the evidence of past offenses was not inflammatory and there was no risk of confusion since the August 1993 domestic violence was much less serious than the charged act. August 1993 was not very distant from November 1994 when the charged offenses occurred, so the prior act was not remote. Testimony about the August 1993 acts did not consume much time. The past acts were determined by section 1109 to be highly probative. Accordingly, admission of the evidence of the August 1993 domestic violence was not an abuse of discretion.

III. Rebuttal

Appellant contends that the rebuttal testimony of Dr. Ronald H. Roberts regarding appellant's antisocial personality characteristics should have been excluded. This contention lacks merit.

The precise testimony in question is quoted at length in appellant's opening brief. We find it unnecessary to repeat the quotations in our opinion. Suffice it to say that

the testimony arose in the context of interpreting appellant's psychological test data and included some very unfavorable evaluations of appellant's personality. Dr. Roberts was discussing the Minnesota Multiphasic Personality Inventory (MMPI) and the Million Clinical Multiaxial Inventory (MCMI). Both are standardized measures of personality function and were initially utilized by defense experts to support their evaluation of appellant's mental condition.

"The admission of rebuttal evidence rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of palpable error." (*People v. Kelly* (1990) 51 Cal.3d 931, 965, internal quotation marks and citations omitted.)

Standard personality tests such as the MMPI and MCMI can be referred to in trials and relied on by expert witnesses. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1158-1159.) "[I]ssues of test reliability and validity may be thoroughly explored on cross-examination at trial. [Citation.] The prosecution may also call, in rebuttal, another expert of comparable background to challenge defense expert methods. [Citation.]" (*Id.* at p. 1159.) Prosecution rebuttal experts may criticize the defense experts' interpretation of tests administered to a defendant. (*People v. Coleman* (1985) 38 Cal.3d 69, 79-80.)

"The meaning of the term 'personality disorder' certainly relates 'to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the' jury. [Citation.] The testimony was also proper rebuttal." (*People v. Carpenter* (1997) 15 Cal.4th 312, 406.) "Psycopath," "antisocial personality disorder," and "undersocialized aggressive type" share many of the same

elements and are each proper diagnoses by an expert witness. (*People v. Clark* (1993) 5 Cal.4th 950, 1029.)

In the instant case, the subject of appellant's mental condition was first raised by the defense. The defense expert witnesses concluded that based on all the data before them – including family history, MMPI, MCMI, other psychological test results, and the record of the instant case – appellant suffered from the psychotic disorder of manic-depressive.

However, the defense experts recognized that appellant's MMPI and MCMI test results showed elements of anti-social personality disorder and an arrogant sense of self-worth known as "narcissism" as well as manic depressive. They acknowledged that members of the teams evaluating appellant at Atascadero State Hospital and Patton State Hospital diagnosed appellant as having a personality disorder not otherwise specified or an antisocial personality disorder. Defense experts emphasized certain aspects of the test results to support their diagnosis of manic depressive.

On rebuttal, the prosecution experts reviewed the same data including the MMPI and MCMI. Based on an analysis of all the data, including those test results in issue, Dr. Roberts reached the diagnosis of "personality disorder not otherwise specified" with "prominent aspects of . . . a narcissistic personality disorder" and "antisocial trends." The testimony in issue was effectively used by Dr. Roberts to challenge the methods, interpretations, and conclusions of the defense experts. Accordingly, such testimony was proper rebuttal and no abuse of discretion occurred.

IV. Disposition

The judgment is affirmed.

Hanlon, P.J.

We concur:

Poché, J.

Reardon, J.

(A081873, *People v. Sterling*)

IN THE COURT OF APPEAL
FOR THE NINTH CIRCUIT

DANIEL STERLING,
Petitioner-Appellant,
v.
ERNEST C. ROE, Warden,
Respondent-Appellee.

No. 02-16129
D.C. No. CV-01-03809-WHA
Northern District of California, San Francisco
ORDER
(Filed Apr. 16, 2003)

Before: TROTT, RYMER, and TALLMAN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing, and to deny the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it, Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc, are DENIED.